

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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March 3, 2005

In the Matter of
Arlex Oil Corporation

Docket No. 2005-242
File No. 368
Lexington

RECOMMENDED FINAL DECISION

The Department moved to dismiss this appeal of a hazardous waste transporter license issued to Arlex Oil Corporation arguing that the petitioner, Mr. Brian Susnock, lacks standing and has failed to state a claim upon which relief can be granted. I recommend granting the Department's motion and dismissing this appeal pursuant to 310 CMR 1.01(5)(a)15.f.v.

The petitioner requested an adjudicatory hearing contesting the renewal of a hazardous waste transporter license issued to Alex Oil Corporation (Arlex) allowing Arlex to transport hazardous wastes in compliance with M.G.L. c 21C and 310 CMR 30.000.

Mr. Susnock states that he is an abutter to the Arlex property at 275 Massachusetts Avenue in Lexington (the "Arlex Site"). His Notice of Claim presents the following points with respect to the license, which he claims were not adequately considered by the Department during its permit review.

- a. Arlex has been found to be in violation of local and state environmental and nuisance laws by the Lexington Board of Health. Claim, page 1.

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- b. Arlex has expanded over the years becoming an oil depot in a residential neighborhood, essentially an industrial business in an area not zoned for industrial activity. Claim, page 1.
- c. Hazardous waste is stored at the company site at the Arlex site at 275 Massachusetts Avenue, evidenced by a letter from the Fire Chief of Lexington. Claim, page 2.
- d. More than 140,000 gallons of hazardous materials are stored on the Arlex site at 275 Massachusetts Avenue and in several 5300 gallon tank trucks as evidenced by the letter from the Lexington Fire Chief. Claim, page 2.
- e. Proceedings before the Lexington Board of Health established that Arlex' "nighttime operations and run-up of Arlex school buses and trucks" present a health hazard, violate state law and are a nuisance. Claim, page 2.
- f. A significant fuel oil spill occurred on November 12, 2004 (DEP RTN NE-04-3884), and odor from the spill lingered in the air for 16 hours. The spill was not a "minor release." The storm drain where the release occurred is located between two properties owned by Arlex, one of which is an oil depot.¹ Claim, page 2-3. The release is on the edge of conservation land and in a residential neighborhood. Claim, page 1.

The petitioner requests that the Department withhold Arlex' hazardous waste transporter license "until such time as the operator has ceased those operations of its business that violate State and Local Environmental and Nuisance Laws and until a full investigation into the cause of the oil spill that occurred on November 12, 2004 has been conducted." Claim, page 3.

The Department's Motion to Dismiss presents two grounds for dismissal: lack of standing on the part of the petitioner to request an adjudicatory hearing, and failure to state a claim upon which relief can be granted. I address each, and the petitioner's responses below.

¹ The Department's Response to Comments document accompanying the issued license describes the release location as "a storm drain in the Fottler Avenue drain line (off Massachusetts Avenue @ #329)". Response to Comments, paragraph 11. Another release (RTN #3-12792) at 301 Massachusetts Avenue is also mentioned in the Department's Response to Comments (paragraph 12). According to the Department's comments Arlex acquired the property at 310 Massachusetts Avenue after the release occurred, and the prior owner has undertaken clean up responsibilities.

The Petitioner's Standing.

The hazardous waste management regulations provide at 310 CMR 30.890 that “any person aggrieved by a determination by the Department to issue... any license or approval” may request an adjudicatory hearing. “Aggrieved person” is in turn defined as “any person who is or may become a ‘party’ or ‘intervenor’ pursuant to 310 CMR 1.00,” the adjudicatory hearing rules.

Id. Those rules provide that a party is

A specifically named person whose legal rights, duties or privileges are being determined in an adjudicatory proceeding; another person who as a matter of constitutional right or by any provision of the General Laws is entitled to participate fully in the proceeding; any person ...allowed to intervene; any person ...identified as a party in Department regulations, and the Department.

310 CMR 1.01(1)(c). An intervenor is a person “substantially and specifically affected by the adjudicatory proceeding, or persons who have the constitutional or statutory right to intervene without showing that they are substantially and specifically affected.” 310 CMR 1.01(7)(d).

The Department asserts that the legal rights, duties or privileges associated with the license proceeding belong to Arlex, the licensee, and not the petitioner. I agree that the license at issue is a determination of the applicant’s rights, duties and privileges to transport hazardous waste and that the petitioner is not a specifically named person with an articulated right to appeal. Neither do I find a constitutional or statutory right to participate belonging to the petitioner.

The next question is whether the petitioner has standing as a person aggrieved by virtue of meeting the criteria to intervene. A person wishing to intervene must show how they will be specifically and substantially affected by the proceeding. 310 CMR 1.01(7)(d). This showing has been further explained in four parts, including: a) an allegation of a concrete injury the person is likely to suffer as a result of the Department’s decision; b) a nexus between the relief

sought and the subject matter of the proceeding; c) interests that are arguably within the zone of interests to be protected by the statute or regulations in question; and d) that the relief sought will alleviate the alleged harm. Matter of Allen Krasnecky, Matter of Coastal Energy, Inc. Docket No. 2003-101, 2003-102, 2003-122, Ruling on Motion to Intervene (March 10, 2004). “Simply stated, a petitioner must show a concrete injury that would flow from the subject matter of the proceeding. A petitioner must also establish that the interest he seeks to safeguard is within the zone of interests protected by the Act or regulations applicable to the proceeding.” Matter of Town of Hanson, Docket 2000-081, Ruling on Motion to Dismiss for Lack of Standing (January 31, 2001).

The Department argues that the petitioner has no specific right to intervene, and cannot show that he is substantially and specifically affected by the licensing decision to support standing as an intervenor. Missing from the petitioner’s Claim, according to the Department, is a specific injury to or interest of the petitioner that is directly affected by the license for transportation. The Department emphasizes that the petitioner’s concerns focus on the Arlex property, the operations conducted there, its zoning status, as well as local environmental and nuisance laws, and do not fall within the scope of the interests protected by the license, or articulate a specific injury to the petitioner or his property. With respect to compliance with state environmental laws, the Department notes that the license does not authorize storage of hazardous waste at the Arlex Site, and distinguishes Arlex’ virgin oil distribution activities and operations on that property from its transportation of hazardous waste on the public ways of the Commonwealth as authorized by the license. Concluding that the petitioner has not alleged a concrete, specific and substantial injury from the grant of Arlex’ license to transport hazardous wastes so as to bestow him with standing to appeal, the Department urges dismissal of his Claim.

The petitioner responded that he is substantially and specifically affected through ownership of property abutting the Arlex Site, and suggests that both hazardous waste storage and transportation of hazardous waste to and from that site may occur. Response, page 3. He states that withholding the license to transport hazardous waste, the relief he seeks, will prevent spills that may happen during transport from occurring. Response, page 2. Finally he also claims that he suffered an injury as a result of the spill in 2004, which may have involved hazardous waste, and that he has a strong interest in being protected by the relevant environmental statutes. Response, page 2.

First, matters of general public concern, like an interest in the implementation, compliance with and enforcement of environmental statutes, is not enough to establish standing. Matter of NNB Associates, Docket No. 85-91, Decision of Status of Charles River Watershed Association (February 24, 1987) (valuing or caring about the environment does not alone establish standing); Friedman v. Conservation Commission of Edgartown, 62 Mass App. Ct. 539, 818 N.E.2d 208 (2004) (plaintiffs did not have standing when they failed to allege injuries separate from the Town as a whole). The injury alleged by the petitioner must be unique and concrete, different from an injury that would be inflicted on the general public, in order to permit intervention. Id.; Matter of Quarry Hills Associates, Inc., Docket No. 97-110; 97-128, Final Decision, March 11, 1998; Ginther v. Commissioner of Insurance, 427 Mass. 319 at 323, 693 N.E.2d 153 (1998) [allegations of a “direct and certain injury” are required to be considered a person aggrieved with standing, generalizations and fears are not sufficient]. Therefore, the petitioner’s allegations of his interest in upholding environmental standards, state and local environmental law as well as nuisance law, fail to confer standing upon him.

Second, an injury suffered by the petitioner as a result of a past spill, if any, cannot be considered a concrete injury he is likely to suffer in the future as a result of the Department granting Arlex' transportation license.²

The possibility of a future release is a different question. The petitioner suggests the possibility of harm to his property from the transportation of hazardous waste to the Arlex Site and/or the probability of another release, occurring somewhere, incidental to Arlex' transportation of hazardous waste. He contends that "withholding the license to transport hazardous waste would ensure that spills involved in the transport of hazardous waste no longer occur."

To the extent the petitioner alleges harm from a release that may occur during transport within the commonwealth, the claim fails to assert a concrete unique injury to the petitioner. The prevention of potential releases, proper handling and management of hazardous materials and waste and the protection of public health and the environment are some of the underlying purposes of the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, M.G.L. c. 21E, as well as M.G.L. c. 21C. Any future release of hazardous waste from Arlex' transportation activity within the state, including a release in the proximity of the petitioner's property, will be subject to the notification and clean up requirements of those statutes.

A claim of injury to the petitioner's property arising from transportation to the Arlex site or from a potential release there, cannot reasonably be expected to occur because the license does not permit storage of hazardous waste on, or transportation of hazardous waste to the Arlex site. Storage of hazardous waste on the Arlex site next to Mr. Susnock's property is not permitted by

² M.G.L. c. 21E and the Massachusetts Contingency Plan at 310 CMR 40.0000 regulate the clean up of releases of oil and hazardous materials.

either statute (M.G.L. c.21C), regulation (310 CMR 30.000) or the transportation license. The storage, treatment or disposal of hazardous waste requires a license from the Department and is not allowed by the transportation license under appeal. The license does authorize Arlex to expeditiously transport wastes from a generator or other transporter to a designated facility or another transporter designated on the manifest. 310 CMR 30.404(1). Because the Arlex site is not an approved storage, treatment or disposal facility, it may not serve as a designated facility or storage location for any waste transported by Arlex. And if a delivery cannot be made to a designated location, or to the alternate designated location, Arlex is required to contact the waste generator for instructions and either revise the manifest accordingly or return the waste to the generator. 310 CMR 30.404(2).³

The possibility of unauthorized transportation to or storage at the Arlex Site, compounded by a release, as well as consequent injury to the petitioner's property, during Arlex' transportation activities is speculative. Both the license to transport and the regulations require continuous compliance with all the hazardous waste management regulations, which do not allow transportation to or storage of hazardous waste at the Arlex Site.⁴ Though releases of oil and hazardous materials may occur during transport, and could even occur during an unauthorized transportation to the Arlex site or a period of illegal storage, the possibility of waste being illegally located at the Site, followed by events leading to a release, and a resulting injury

³ The license and regulations allow for temporary holding of wastes during transit should the limited circumstances described in 310 CMR 30.408(1) occur (delay in acceptance, weather delays, vehicle breakdowns, etc.). It is possible that circumstances like a mechanical breakdown or other situation described in 310 CMR 30.408(1) might occur in transit that would delay a particular delivery, and under the circumstances listed in that rule, temporary holding of the wastes would then be allowed by a transporter for a period of up to five days at a licensed storage facility or a transportation related area. If the Arlex Site is residentially zoned, it would not be considered a transportation related area, and no temporary holding of waste as allowed by 310 CMR 4.08 would be permitted there. 310 CMR 30.010 (definition of Transportation Related Area)

⁴ A licensee under 310 CMR 30.811 and 30.812 bears a continuing obligation of persuading the Department that it is competent to perform the activity licensed, is in compliance and will continue to be in compliance with 310 CMR 30.000.

to the petitioner is speculative and conjectural. Importantly, no part of such a sequence of events is authorized by the license, and violations of which would be subject to enforcement action by the Department.⁵ Indirect and attenuated connections to the Department's action appealed, and injuries that are abstract, theoretical, remote, or speculative cannot confer standing. Matter of Town of Ipswich, Docket No. 2002-109, Decision and Order of Motions to Dismiss (November 2, 2005); Matter of NBB Associates, Docket No. 85-91, Decision on Status of Charles River Watershed Association (February 24, 1987).

Transportation of hazardous waste to or storage at unauthorized locations (like the Arlex site) would be a violation of the license as well as the hazardous materials management statute (M.G.L. c. 21C) and regulations at 310 CMR 30.000, would be subject to enforcement, and cannot be considered a reasonably likely consequence of the issuance of this license.⁶ As I find no allegation of a direct concrete injury to the petitioner, different from that suffered by the general public and likely to occur as a result of the granting of the license, I find the petitioner does not meet the standard to intervene and therefore lacks standing to appeal the license.

Another separate ground needed to establish standing, related to the relief sought by the petitioner, also lies unmet, and demonstrates both a lack of standing as well as a legally insufficient claim for which relief cannot be granted, as discussed below.

⁵ I also note that the Department's Response to Comments document addressed the petitioner's wish to prevent illegal transportation to or storage of hazardous waste on the Arlex site. It indicates that the Department visited the site to investigate potential illegal storage of wastes or wastes in vehicles parked at the Arlex site, and no violation was found. Response to Comment, Paragraph 8. Should such violations occur in the future they would be subject to enforcement by the Department.

The Relief Sought; Failure to State a Claim Upon Which Relief Can be Granted

Standing as an intervenor also requires a showing that the relief sought will alleviate the alleged harm. Matter of Allen Krasnecky, Matter of Coastal Energy, Inc. Docket No. 2003-101, 2003-102, 2003-122, Ruling on Motion to Intervene (March 10, 2004). This analysis is somewhat similar to that required to evaluate a motion to dismiss for failure to state a claim, focusing on the relation between the remedy requested, the harm alleged by the petitioner, and the Department's ability to grant the relief requested in this forum to prevent the alleged harm.

The Department has also moved to dismiss this appeal for failure to state a claim upon which relief can be granted. A claim may be dismissed based on such a motion when, presuming all facts alleged in the Notice of Claim to be true, the claim does not present grounds for relief. 310 CMR 1.01(11)(d)2. Such a motion tests the legal sufficiency of the claim, or whether the relief sought can be provided. In the Matter of Lawson, Docket No. 2000-111, Recommended Final Decision (February 2, 2001). Claims may be dismissed as legally insufficient if it appears beyond all doubt that the petitioner is entitled to no relief available. Matter of Sheridan, Trustee, Brookmeadow Development Trust, Docket No. 98-001, Ruling on Motion to Dismiss (June 2, 1998).

The relief petitioner seeks is the withholding of the license for an indeterminate period of time, until the applicant complies with state and local environmental laws, nuisance law, and until an investigation of the November 2004 spill is completed, in order to prevent spills from occurring in the future. The petitioner is essentially alleging current violations, predicts future violations and requests proof of compliance by the applicant with all hazardous materials and hazardous waste management requirements at the Arlex Site before a license to transport hazardous waste is granted.

To the extent that the petitioner requests compliance with laws not administered by the Department (zoning requirements and local environmental laws), no relief can be granted by this agency. To the extent the petitioner is requesting investigation or enforcement by the Department under statutes other than M.G.L.c. 21C, that relief cannot be granted through this review of the transportation license.⁷

Finally to the extent that the petitioner requests assurance in advance with the hazardous waste transportation, licensing and storage requirements, the license does exactly that by requiring ongoing compliance with M.G.L. c. 21C and its regulations. Any future violation of that statute can be grounds for modification, suspension or revocation of the license under 310 CMR 30.853, or the subject of a Departmental enforcement action such as an Administrative Order or Civil Administrative Penalty. Withholding a license because of the potential for future spills, if applied to all applicants for transportation licenses would prevent the issuance of any license, and preclude transportation of hazardous waste within the commonwealth, a result not contemplated by the statute. See 310 CMR 30.805 (requirements for transportation licenses). Because the relief requested, indefinite withholding of the transportation license contingent upon future compliance, will not necessarily prevent the possibility of future spills, and assurance of preventing future spills is not within the scope of relief that may be granted in this license, I also recommend dismissal for failure to state a claim.

⁷ The Department's Motion notes that its permit review process included consideration of the November 2004 spill. In its Response to Comments document, the Department states that the Arlex Site at 275 Massachusetts Avenue is not a hazardous material release site being remediated under the MCP, that Arlex is not an identified responsible party for the release at 329 Massachusetts Avenue, and that the former owner of the property at 301 Massachusetts Avenue has assumed responsibility for site cleanup at that property. Response to Comments, paragraphs 11, 12. No violation of M.G.L. c.21E was noted in the Response to Comments.

For the reasons outlined above, I recommend granting the Department's motion and dismissal of this claim pursuant to 310 CMR 1.01(5)(a)15.f.v. for lack of standing and failure to state a claim upon which relief can be granted.

NOTICE

This decision is a recommended final decision of the Presiding Officer. It has been transmitted to the Commissioner for his final decision in this matter. This decision is therefore not a final decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c.30A. The Commissioner's final decision is subject to rights and reconsideration and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this recommended final decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

Ann Lowery
Presiding Officer

Adopted by Commissioner Robert W. Golledge, Jr., March 8, 2006.